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EPA-ECOS Compliance Assurance Working Group

From: Catherine McCabe, Deputy Regional Administrator, EPA Region 2

Date: January 5, 2018

Re: Comments on November 27 Draft Team 1 Work Paper

First, I would like to commend Patrick and Ed for the thoughtful draft of November 27, 2017. The high-level approach and short length is especially appreciated. Thank you for this opportunity for input.

Second, I strongly endorse the excellent comments and suggestions noted in Larry Starfield's December 5 memo.

Third, I'd like to add a few more thoughts about the critical nature of the undertaking that we are jointly engaged in, and some of the important principles that I think we need to keep in mind as we proceed. We are not the first thoughtful and dedicated professionals to consider the important and challenging question of how to strike the right balance between federal and state compliance efforts to ensure that the promise of our federal environmental laws is met. Together, EPA and the states have been outstandingly successful in achieving that goal over the past decades. The continued success of our efforts depends heavily on the care that we take in considering this important question from the broadest and fullest perspective. To that end, let's be sure to take advantage of the full wisdom of those who have gone before us, as well as the lessons we have learned over time.

As the November 27 draft notes, the basic principles for EPA's working relationship with delegated states were established in 1984 by Administrator William Ruckelshaus (*EPA Policy on Oversight of Delegated Environmental Programs*). I believe those principles continue to be valid today. We should approach any revisions of this policy, issued by one of EPA's most universally respected Administrators, with great caution and care. While I understand that direct revision of that policy is not on the table at the moment, the November 27 draft seems to suggest new interpretations of that policy that would effect fundamental changes.

For example, the November 27 draft emphasizes statements from the Ruckelshaus memo supporting the primacy of the states' role and responsibilities (p. 2), but omits mention of the statements about EPA's role and responsibilities, including the following:

- "[A]fter delegation, EPA remains responsible and accountable to the President, the congress and the public for progress toward meeting national environmental goals and for ensuring that federal statutes are adequately enforced" (p.1);
- "[EPA's oversight responsibility] necessitates both a continuing strong EPA presence and a workable State-EPA relationship that takes advantage of the particular strengths and capabilities of each" (p.1);
- "It is the policy of EPA to conduct oversight of delegated state programs in order to . . . ensure adequate environmental protection, through continued development and enforcement of national standards, and use of direct enforcement action against pollutions as necessary to reinforce state action and authority" (p.2);
- "EPA's oversight responsibility is to ensure the even-handed application of federal environmental laws, regulations and standards, and to provide states with the necessary assistance, tools, methods, and back-up support to solve environmental problems" (p. 3)
- "While delegated states have primary responsibility for compliance and enforcement, EPA cannot abdicate its responsibilities to the Congress to ensure that national goals and objectives are met; after

delegation, EPA remains responsible and accountable to the President, the congress and the public for progress toward meeting national environmental goals and for ensuring that federal statutes are adequately enforced” (p. 5).

I suggest that, at a minimum, these statements be added to the November 27 draft to present a more balanced characterization of the Ruckleshaus policy.

More importantly, the first question we should ask is whether the Ruckleshaus policy needs to be revised. If it does, we should start an appropriate process, including an opportunity for public comment, to develop a new statement of EPA policy on oversight of delegated state programs. I think it unwise to issue a joint EPA-ECOS paper that purports to state EPA policy, yet differs from the long-established Ruckleshaus policy in significant respects. This will only cause confusion, rather than the regulatory clarity and certainty that is our shared goal.

The principle of “subsidiarity” proposed in the November 27 draft paper is consistent with the Ruckleshaus policy in recognizing both the primary responsibility of the states for compliance and enforcement, and the need for EPA and state partners to take advantage of each other’s “particular strengths and capabilities.” In suggesting devolution of responsibility to the lowest level of government that is “capable” of carrying out that responsibility, the November 27 draft also appropriately recognizes that “[c]apability in the context of environmental enforcement includes evaluating whether the least centralized authority has sufficient enforcement resources, technical ability, technology, and the political will to foster compliance and correct noncompliance” (p.2).

Experience has taught us that there is considerable variation in the “capability” of the various states (and delegated territories and Indian tribes) to implement effective compliance and enforcement programs. In addition, capability varies over time. Even states that had developed strong and capable programs have seen their capacities diminished in recent years by declining budgets. That trend is expected to continue. In these circumstances, it is particularly important to assure the continued vitality and ability of both federal and state partners to provide an effective compliance and enforcement presence. EPA cannot be expected to continue to perform that role adequately, when a state cannot, unless we recognize and support the need to maintain critical enforcement and compliance resources and activity at the federal, as well as the state, level.

The need for national consistency in our compliance approach is expressly recognized in Goal 3 of EPA’s draft 2018-2022 Strategic Plan (Rule of Law and Process), which states that “[o]ne of EPA’s highest priorities must be to create consistency and certainty for the regulated community [and c]onsistency in how the laws and regulations are applied across the country is part of that process” (p.25). Objective 3.1 of the draft Strategic Plan (Compliance with the Law) observes that:

For decades, the protections mandated by federal environmental laws have been essential to the growth of American prosperity. Noncompliance with those laws diminishes shared prosperity and unfairly tilts the field of economic competition in favor of those that skirt the law. Draft Strategic Plan -- Objective 3.1, p.26.

The principle of maintaining a level economic playing field is particularly critical to assure fairness of economic and business opportunity across state lines, in light of the reality of the varying levels of states’ capabilities across the country. States with less capable compliance and enforcement programs may benefit economically, by attracting businesses that expect lower compliance costs. But this is unfair to the states with stronger programs. Worse, it creates the perverse incentive for other states to follow suit and relax their own enforcement programs – the so-called “race to the bottom.” In the current extremely competitive and fluid national business environment, maintaining a level national playing field that is fair to all states and businesses is more important than ever to avoid this undesirable result.

Therefore, I suggest that we add the principles of national consistency and the level economic playing field, as well as the statements from EPA’s draft Strategic Plan above, to the November 27 draft paper.

I am particularly concerned about the suggestions in the November 27 draft that EPA's oversight role should be limited to that of an auditor, and that EPA should only conduct inspections if a state so requests or agrees. Audits certainly are a useful tool for oversight. For over a decade EPA and the states have been using a framework for EPA's audits of delegated states' compliance and enforcement programs that was agreed upon by EPA and ECOS. This audit framework has been very helpful in assisting states to identify areas where improvement is needed, as well as providing a national picture of state performance. However, an audit ultimately only identifies areas for improvement, and by itself cannot assure the maintenance of effort and capability by all the states necessary to provide national consistency and a level economic playing field. To accomplish that, EPA must continue to use all its tools to maintain an effective national compliance and enforcement program, including the tools of direct inspections and enforcement where necessary, as intended by Congress and reflected in all the federal environmental statutes.

Thank you for this opportunity to comment. I have noted some additional specific drafting suggestions in the text of the attached redlined version of the November 27 draft paper.